

**SELECTED EXCERPTS: IKE SKELTON NDAA FOR FY 2011, §§ 801 & 824 LEGISLATIVE HISTORY**

**1. Excerpts from IKE SKELTON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, Pub. L. 111-383, January 07, 2011**

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**SEC. 801. DISCLOSURE TO LITIGATION SUPPORT CONTRACTORS.**

(a) IN GENERAL.—Section 2320 of title 10, United States Code, is amended—

(1) in subsection (c)(2)—

(A) by striking “subsection (a), allowing” and inserting

“subsection (a)—

“(A) allowing”; and

(B) by adding at the end the following new subparagraph:

“(B) allowing a covered litigation support contractor access to and use of any technical, proprietary, or confidential data delivered under a contract for the sole purpose of providing litigation support to the Government in the form of administrative, technical, or professional services during or in anticipation of litigation; or”; and

(2) by inserting after subsection (f) the following:

“(g) In this section, the term ‘covered litigation support contractor’ means a contractor (including an expert or technical consultant) under contract with the Department of Defense to provide litigation support, which contractor executes a contract with the Government agreeing to and acknowledging—

“(1) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

“(2) that the covered litigation support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered litigation support contractor; and

“(3) that such technical data provided to the covered litigation support contractor under the authority of this section shall not be used by the covered litigation support contractor to compete against the third party for Government or non-Government contracts.”.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date that is 120 days after the date of the enactment of this Act.

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**SEC. 824. GUIDANCE RELATING TO RIGHTS IN TECHNICAL DATA.**

(a) REVIEW OF GUIDANCE.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall review guidance issued by the military departments on the implementation of section 2320(e) of title 10, United States Code, to ensure that such guidance is consistent with the guidance issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the requirements of this section. Such guidance shall be designed to ensure that the United States—

(1) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds as defined in accordance with the amendments made by this section; and

(2) is not required to pay more than once for the same technical data.

(b) RIGHTS IN TECHNICAL DATA.—Section 2320(a) of title 10, United States Code, is amended—

(1) in paragraph (2)(F)(i)—

(A) by redesignating subclauses (I) and (II) as subclauses (II) and (III), respectively; and

(B) by inserting before subclause (II), as so redesignated, the following new subclause (I):

“(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;” and

(2) in paragraph (3), by striking “for the purposes of definitions under this paragraph” and inserting “for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)”.

(c) VALIDATION OF PROPRIETARY DATA RESTRICTIONS.—Section 2321(d)(2) of title 10, United States Code, is amended—

(1) in subparagraph (A), by striking “A challenge” and inserting “Except as provided in subparagraph (C), a challenge”; and

(2) by adding at the end the following new subparagraph (C):

“(C) The limitation in this paragraph shall not apply to a case in which the Secretary finds that reasonable grounds exist to believe that a contractor or subcontractor has erroneously asserted a use or release restriction with regard to technical data described in section 2320(a)(2)(A) of this title.”.

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**2. Excerpts from the “Joint Explanatory Statement of The Committees on Armed Services of The U.S. Senate and House of Representatives on H.R. 6523,Ike Skelton National Defense Authorization Act For Fiscal Year 2011,” dated December 22, 2010**

***Disclosure to litigation support contractors (sec. 801)***

The House bill contained a provision (sec. 801) that would amend section 2320 of title 10, United States Code, to address the protections applicable when non-public information is disclosed to litigation support contractors.

The Senate committee-reported bill contained no similar provision.

The agreement includes the House provision with a clarifying amendment.

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### ***Guidance relating to rights in technical data (sec. 824)***

The Senate committee-reported bill contained a provision (sec. 832) that would require the Secretary of Defense to revise guidance on rights in technical data to promote competition and ensure that the United States is not required to pay more than once for the same technical data.

The House bill contained no similar provision.

The agreement includes the provision with a clarifying amendment.

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### **3. Excerpts from House Report 111-491, to accompany H.R. 5136**

## **SECTION 801--DISCLOSURE TO LITIGATION SUPPORT CONTRACTORS**

This section would amend section 2320 of title 10, United States Code, to allow the Secretary of Defense to disclose technical data to a litigation support contractor for the purpose of assisting the Department of Defense in preparing for litigation. This section would require that the litigation support contractor: use the technical data only for the purpose of fulfilling its contract with the Department; take all reasonable steps to protect the technical data; and not use the technical data to compete with the owner of the technical data on any government or non-government contract. This section would take effect 120 days after the date of enactment of this Act.

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### **SEC. 801. DISCLOSURE TO LITIGATION SUPPORT CONTRACTORS.**

(a) In General- Section 2320 of title 10, United States Code, is amended--

(1) in subsection (c)(2)--

(A) by inserting `or covered litigation support contractor' after `covered Government support contractor'; and

(B) by inserting after `oversight of' the following: `, or preparation for litigation relating to,'; and

(2) by inserting after subsection (f) the following:

`(g) In this section, the term `covered litigation support contractor' means a contractor (including an expert or technical consultant) under contract with the Department of Defense to provide litigation support, which contractor executes a contract with the Government agreeing to and acknowledging--

`(1) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

`(2) that the covered litigation support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered litigation support contractor; and

`(3) that such technical data provided to the covered litigation support contractor under the authority of this section shall not be used by the covered litigation support contractor to compete against the third party for Government or non-Government contracts.'.

(b) Effective Date- The amendments made by subsection (a) shall take effect on the date that is 120 days after the date of the enactment of this Act.

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**4. Excerpts from Senate Report 111-201, to accompany S.3454:**

***Competition for production and sustainment and rights in technical data (sec. 832)***

The committee recommends a provision that would require the Secretary of Defense to issue guidance on rights in technical data to ensure that the Department of Defense (DOD) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds or without significant contribution by a contractor or subcontractor and that the United States is not required to pay more than once for the same technical data. The provision would also provide DOD with improved tools to address situations in which a contractor has erroneously asserted a restriction on the use or release of technical data that was developed exclusively with Federal funds or without significant contribution by the contractor or subcontractor.

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**SEC. 832. COMPETITION FOR PRODUCTION AND SUSTAINMENT AND RIGHTS IN TECHNICAL DATA.**

(a) Guidance- Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall issue guidance on the implementation of section 2320(e) of title 10, United States Code. Such guidance shall be designed to ensure that the United States--

- (1) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds or without significant contribution by a contractor or subcontractor; and
- (2) is not required to pay more than once for the same technical data.

(b) Rights in Technical Data- Section 2320(a) of title 10, United States Code, is amended--

(1) in paragraph (2)(A), by striking `exclusively with Federal funds' and inserting `exclusively with Federal funds or without significant contribution by a contractor or subcontractor';

(2) in paragraph (2)(F)(i)--

(A) by redesignating clauses (I) and (II) as clauses (II) and (III), respectively; and

(B) by inserting before clause (II), as so redesignated, the following new clause (I):

`(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor'; and

(3) in paragraph (3)--

(A) by striking `and `exclusively at private expense' and inserting `exclusively at private expense', and `significant contribution by a contractor or subcontractor'; and

(B) by striking `for the purposes of definitions under this paragraph' and inserting `for the purposes of paragraph (2)(B)'.

(c) Validation of Proprietary Data Restrictions-

(1) REPEAL OF DELIMITING PERIOD ON CHALLENGES OF

RESTRICTIONS- Section 2321(d) of title 10, United States Code, is amended--

(A) by striking paragraph (2); and

(B) by redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively.

(2) GUIDANCE ON CHALLENGES TO RESTRICTIONS- Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall issue guidance on the circumstances under which a challenge to an asserted use or release restriction may be made after the end of the three-year period described in section 2321(c)(2) of title 10, United States Code. Such guidance shall be designed to ensure that such challenges are made only in cases where there is strong evidence that the asserted restriction is inconsistent with the requirements of section 2320, United States Code.

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